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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

HUEY JIUAN LIANG, Plaintiff and Appellant, v. PETER M. LEVY et al., Defendants and Respondents.	G050834 (Super. Ct. No. 30-2012-00564933) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Peter J. Wilson, Judge. Affirmed. Motion for sanctions. Denied.

WHGC, Law Office of Michael G. York and Michael G. York for Plaintiff and Appellant.

Murtaugh Meyer Nelson & Treglia, Michael J. Murtaugh and Devin E. Murtaugh for Defendants and Respondents Peter M. Levy and Marc Holstein.

Berger Harrison and Benjamin Berger for Defendants and Respondents Benjamin Berger and Berger Harrison, APC.

* * *

INTRODUCTION

Huey Jiuan Liang, Peter M. Levy, and Marc Holstein were all members of two limited liability companies. When a corporate opportunity became available to one of those companies, Levy approached Liang and asked her to provide the necessary funding to acquire it. Liang told Levy she was either unwilling or unable to do so. Levy and Holstein then acquired the opportunity through another company, of which Liang was not a member. Liang sued.

After a bench trial, the court found in favor of Levy and Holstein, and entered judgment against Liang. On appeal, Liang challenges the judgment on three specific grounds. We affirm because (1) based on the evidence and argument at trial, Liang lacked standing to assert six of her 10 causes of action; (2) new arguments regarding standing with respect to those six causes of action, which she raises for the first time on appeal, have been forfeited; and (3) Liang failed to prove any nonspeculative damages for any and all of her remaining causes of action. We do not need to reach Liang's other argument regarding the corporate opportunity doctrine.

STATEMENT OF FACTS AND PROCEDURAL HISTORY[1]

Liang, Levy, and Holstein were members of two limited liability companies, Automotive Remarketing Xchange, LLC (Automotive Remarketing), and Huey & Associates, LLC (Huey & Associates).[2] Automotive Remarketing was an online automobile auction company. The software it used in its business was developed and licensed by AWG Remarketing, Inc. (AWG). Benjamin Berger and Berger Harrison, APC (Berger Harrison), were attorneys allegedly representing Liang.

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[1] Liang does not challenge the sufficiency of the evidence. Therefore, our statement of facts reflects the facts found to be true by the trial court in the statement of decision.

[2] William Bonnaud was also a member of both limited liability companies, but is not a party to this appeal.

In May 2011, an opportunity arose for Huey & Associates to acquire AWG for $3 million, and Levy approached Liang about providing the necessary funding. Liang informed Levy that she was no longer willing or able to provide the funding necessary for Huey & Associates to acquire AWG. One hundred percent of the stock of AWG was purchased by another limited liability company part-owned by Levy.

Liang sued Levy, Holstein, Berger, and Berger Harrison, asserting causes of action for breach of an oral partnership agreement, breach of fiduciary duty, fraudulent misrepresentation, fraudulent concealment, breach of the implied covenant of good faith and fair dealing, unjust enrichment, professional negligence, and violation of the corporate opportunity doctrine. During the course of the litigation, Automotive Remarketing and Huey & Associates were cancelled with the California Secretary of State.

Following a bench trial, the court issued a statement of decision finding in favor of Levy, Holstein, Berger, and Berger Harrison on all causes of action, and entered judgment against Liang. Liang filed motions to set aside and vacate the judgment, and for a new trial, which the trial court denied. Liang timely filed a notice of appeal.

DISCUSSION

I.

LIANG'S LACK OF STANDING

The trial court found that Liang lacked standing for six of the 10 causes of action she raised because those causes of action were for derivative claims belonging to Huey & Associates or Automotive Remarketing.[3] At trial, Liang contended that the

[3] The causes of action were for breach of an oral partnership agreement, breach of fiduciary duty (alleged in two different causes of action), breach of the implied covenant of good faith and fair dealing, unjust enrichment, and violation of the corporate opportunity doctrine.

claims of the limited liability companies were assigned to her in writing before the limited liability companies were cancelled. The trial court found that Liang had failed to prove the existence of any oral or written assignment of claims, and noted that its conclusion was compelled by "[t]he contradictory, inconsistent, and at times wholly implausible testimony and argument regarding these assignments." Substantial evidence supported the trial court's findings, and Liang makes no challenge to the contrary.

Instead, Liang argues for the first time on appeal that she succeeded to the limited liability companies' claims by operation of law. "An appellate court ordinarily will not consider arguments made for the first time on appeal. [Citations.] 'The general rule confining the parties upon appeal to the theory advanced below is based on the rationale that the opposing party should not be required to defend for the first time on appeal against a new theory that "contemplates a factual situation the consequences of which are open to controversy and were not put in issue or presented at the trial." [Citation.]' [Citation.]" (*C9 Ventures v. SVC-West, L.P.* (2012) 202 Cal.App.4th 1483, 1491-1492.) There are no grounds for us to consider this argument for the first time on appeal, and we decline to do so.

II.

NO PROOF OF DAMAGES

In the statement of decision, the trial court found that Liang had failed to prove any nonspeculative damages on any cause of action. Liang does not challenge that finding on appeal.

Liang contends, however, that she was entitled to the imposition of a constructive trust over the "property, profit or benefit" that Levy and Holstein derived from acquiring AWG.

In the fifth amended complaint, Liang alleged in her 10th cause of action for violation of the corporate opportunity doctrine that she was entitled to the imposition

of a constructive trust over Levy's and Holstein's interests in the separate company that acquired AWG. As explained *ante*, based on the evidence and argument at trial, Liang did not have standing to pursue the cause of action for violation of the corporate opportunity doctrine. Liang did not request imposition of a constructive trust for any of the causes of action, which she had standing to bring,[4] and she did not include a prayer for imposition of a constructive trust in the prayer for relief.

Liang did include in her trial brief an intention to seek, in addition to money damages, imposition of a constructive trust. What is included in a party's trial brief is not evidence, and therefore does not establish that Liang made any attempt to prove a constructive trust at trial.

Liang fails to provide any citations to the reporter's transcript to show she even mentioned the remedy of a constructive trust at trial. By failing to cite to the record, Liang has forfeited the argument on appeal. "When an appellant's brief makes no reference to the pages of the record where a point can be found, an appellate court need not search through the record in an effort to discover the point purportedly made." (*In re S.C.* (2006) 138 Cal.App.4th 396, 406; see *Dietz v. Meisenheimer & Herron* (2009) 177 Cal.App.4th 771, 799-800; Cal. Rules of Court, rule 8.204(a)(1)(C).)

Liang's closing trial brief also supports our conclusion that she did not seek the remedy of a constructive trust over the value of AWG at trial. (Closing briefs were filed by the parties in lieu of closing argument at the bench trial.) Liang's closing brief does not even mention a constructive trust, while discussing in detail the evidence supporting her request for damages. Further, Liang's closing brief contends that the appropriate burden of proof is by a preponderance of the evidence, although entitlement to a constructive trust must be proven by clear and convincing evidence (*Lauricella v.*

[4] Those causes of action were for fraudulent misrepresentation against Levy, fraudulent concealment against Levy and Holstein, and professional negligence and fraudulent concealment against Berger and Berger Harrison.

Lauricella (1911) 161 Cal. 61, 69). Having failed to prove she properly requested a constructive trust in the trial court, Liang is estopped from claiming error on appeal due to the trial court's failure to impose a constructive trust.

Absent any proof of damages, or any claim for imposition of a constructive trust, all of Liang's causes of action fail.

MOTION FOR SANCTIONS

Levy and Holstein filed a motion for sanctions on appeal, contending that the appeal is frivolous and was filed solely to cause delay.

"The California cases discussing frivolous appeals provide a starting point for the development of a definition of frivolous. Those cases apply standards that fall into two general categories: subjective and objective. [Citation.] The subjective standard looks to the motives of the appellant and his or her counsel. . . . [¶] The objective standard looks at the merits of the appeal from a reasonable person's perspective. 'The problem involved in determining whether the appeal is or is not frivolous is not whether [the attorney] acted in the honest belief he had grounds for appeal, but whether any reasonable person would agree that the point is totally and completely devoid of merit, and, therefore, frivolous.' [Citations.] [¶] The two standards are often used together, with one providing evidence of the other. Thus, the total lack of merit of an appeal is viewed as evidence that appellant must have intended it only for delay. [Citations.] [¶] Both strands of this definition are relevant to the determination that an appeal is frivolous. An appeal taken for an improper motive represents a time-consuming and disruptive use of the judicial process. Similarly, an appeal taken despite the fact that no reasonable attorney could have thought it meritorious ties up judicial resources and diverts attention from the already burdensome volume of work at the appellate courts. Thus, an appeal should be held to be frivolous only when it is prosecuted for an improper motive—to harass the respondent or delay the effect of an

adverse judgment—or when it indisputably has no merit—when any reasonable attorney would agree that the appeal is totally and completely without merit. [Citation.] [¶] However, any definition must be read so as to avoid a serious chilling effect on the assertion of litigants' rights on appeal. Counsel and their clients have a right to present issues that are arguably correct, even if it is extremely unlikely that they will win on appeal. An appeal that is simply without merit is *not* by definition frivolous and should not incur sanctions. Counsel should not be deterred from filing such appeals out of a fear of reprisals." (*In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 649-650, fn. omitted.)

While Liang's arguments on appeal are not meritorious, we do not find that this appeal meets the high standard of frivolousness, nor do we agree that Liang's appeal was brought in bad faith for purposes of delay. The motion for sanctions is denied.

DISPOSITION

The judgment is affirmed. Respondents to recover costs on appeal.

FYBEL, J.

WE CONCUR:

O'LEARY, P. J.

IKOLA, J.